Supreme Court, U.S.
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No. 87-719

In The
# Supreme Court of the United States
October Term, 1987

PATRICK CURTIS MARTIN,

*Appellant,*

vs.

THE GEORGIA DEPARTMENT OF PUBLIC SAFETY, HUGH HARDISON AND D.E. COCHRAN,

*Appellees.*

## ON APPEAL FROM THE SUPREME COURT OF GEORGIA

## BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

David W. Griffeth
Counsel of Record

J. Richardson Brannon

Suite 201
957 Baxter Street
Athens, Georgia 30606
Telephone: (404) 353-1360

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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## STATEMENT OF FACTS

Appellant incorporates herein the statement of facts as presented in his Jurisdictional Statement, and therefore will not repeat them. However, Appellant does dispute Appellees' statement of facts as contained in their Motion to Dismiss or Affirm.

Appellees state that it is undisputed that Defendant Alan Seabolt (not a party to this appeal) "heard radio traffic regarding the pursuit and attempted to render assistance (unsolicited) to Appellee Cochran." Appellees' Motion To Dismiss or Affirm, at p. 3. This is a gross misstatement of the facts of this case. The Georgia Supreme Court's opinion states, in relevant part,

> During the chase, Cochran was in radio contact with Alan Seabolt, a Lumpkin County Deputy Sheriff. The plan was that Seabolt would attempt to block an intersection ahead of Brewer and Cochran, thus ending the chase. At one point, Cochran requested Seabolt to hurry . . .

*Martin v. Georgia Department of Public Safety*, 257 Ga. 300, 301 (1987). Appellees somehow interpret the above passage to mean that Defendant Alan Seabolt's assistance was "unsolicited" by Appellee Cochran. This imaginative interpretation of the facts is clearly wrong, and to suggest that Appellant does not dispute the accuracy of this interpretation is nonsense.

## I. THE ISSUES PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT ARE PROPERLY BEFORE THIS COURT.

Appellant has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(2). Appellees contend that this

section does not grant this Court jurisdiction to consider the issues raised by Appellant's Jurisdictional Statement. Appellees are wrong.

Appellant has challenged a provision of the Georgia Constitution as being violative of the Fourteenth Amendment's equal protection clause. The language of Section 1257(2) refers to a "statute of any state". This has been defined to encompass state constitutional provisions. See, *Railway Express Co. v. Virginia,* 282 U.S. 440 (1930); *Adamson v. California,* 332 U.S. 46 (1946); and *Torcaso v. Watkins,* 367 U.S. 488 (1960). Accordingly, this appeal is properly before this Court.

Appellant's Jurisdictional Statement also assigns as error the Georgia Supreme Court's denial of Appellant's 42 U.S.C. Section 1983 cause of action against Appellees. Because this appeal is properly before this Court, the Appellant may include in his assignments of error "any other denial of federal right whether or not capable in itself of being brought here by appeal." *Flourney v. Wiener,* 321 U.S. 253, 263 (1943). See also, *Prudential Insurance Co. v. Check,* 259 U.S. 530 (1921). Clearly, Appellant's entire Jurisdictional Statement is properly before this Court.

## II. THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE EXERCISE OF JURISDICTION BY THIS COURT.

This action has been brought by a Georgia citizen against a Georgia department, Georgia officials, and others in a state court of Georgia. The Eleventh Amendment,

which limits the federal judicial power, is by its very language not applicable to actions in state courts. Furthermore, the Eleventh Amendment has not been interpreted as a bar to actions brought in state courts. See, *Martinez v. California,* 444 U.S. 277, 283 n.7 (1980); and *Employees v. Missouri Public Health Department,* 411 U.S. 279, 298 (1972).

In a 42 U.S.C. Section 1983 cause of action brought in a state court of Maine this Court held that "no Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '(t)he Judicial power of the United States.'" *Maine v. Thiboutot,* 448 U.S. 1, 9 n.7 (1980).

Neither is the Eleventh Amendment a bar to the appeal before this Court. It has been well settled since *Cohens v. Virgina,* 19 U.S. (6 Wheat.) 264 (1821) that a suit begun in state court and appealed to the United States Supreme Court is not within the prohibition of the Eleventh Amendment. In *Cohens,* Chief Justice Marshall wrote, at 410, that "the effect of a writ of error is simply to bring the record into court. . . . [T]he transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined." Appellees' contention that this appeal to the Supreme Court is proscribed by the Eleventh Amendment is therefore without merit.

## III. APPELLEES HARDISON AND COCHRAN ARE NOT ENTITLED TO QUALIFIED IMMUNITY UNDER 42 U.S.C. SECTION 1983

Appellees Hardison and Cochran claim that they are entitled to qualified immunity as government officials and that this Court therefore need not reach the questions presented for review under Appellant's 42 U.S.C. Section 1983 claim. Qualified immunity is a defense to liability, and while an official may be able to assert the defense in a personal-capacity action (which assertion, Appellant contends, would be without merit in the case sub judice), the defense is not available in an official-capacity action. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Appellees Hardison and Cochran were named in both their official and their personal capacities, and they are clearly not entitled to the defense of qualified immunity in their official capacities.

The question of whether these Appellees may be shielded from personal liability for their actions under color of state law depends on the "objective legal reasonableness" of those actions. *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). Government officials may claim qualified immunity only in those instances where their actions could reasonably have been thought to be consistent with established rights. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [cited omitted]; but it is to say that in the light of pre-existing law, the unlawfulness must be ap-

parent." *Anderson v. Creighton*, 483 U.S. —, 97 L.Ed.2d 523, 531 (1987).

Appellant asserts that the contours of the right to due process of law have been clearly established, and that Appellees' actions which succeeded in depriving Appellant of his right to life and liberty were plainly in violation of that right. Thus it is beyond dispute that the actions of Appellees violated clearly established rights of the Appellant on November 9, 1984, and Appellees cannot be shielded from liability under 42 U.S.C. 1983 by asserting the defense of qualified immunity.

## CONCLUSION

For the above and foregong reasons, Appellant asks this Court to deny Appellees' Motion to Dismiss or Affirm.

Respectfully submitted,

DAVID W. GRIFFETH,
State Bar No. 310600
Counsel of Record
for the Appellant

J. RICHARDSON BRANNON
State Bar No. 077650

Suite 201
957 Baxter Street
Athens, Georgia 30606
(404) 353-1360